

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0177 ITC
Indiana Corporation Income Tax
Gross Income Tax – Withholding
For The Tax Periods: 1994, 1995, and 1996

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ISSUE

Gross Income Tax: Withholding on Nonresident Contractors

Authority: IC 6-2.1-2-2; IC 6-2.1-6-1; 45 IAC 1.1-1-24; Brown Boveri Corp. v. Indiana Department of State Revenue, 439 N.E.2d 561 (Ind. 1982).

Taxpayer protests the Department's proposed assessment of withholding tax liability.

STATEMENT OF FACTS

Taxpayer operates a secondary steel refinery. Taxpayer purchased large manufacturing equipment and installation from several nonresident contractors. Additional facts will be provided as needed.

DISCUSSION

Indiana imposes an income tax, known as the gross income tax, upon the receipt of "the taxable gross income derived from activities or businesses or any other sources within in Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." IC 6-2.1-2-2. Except as provided in IC 6-2.1-6-1, each calendar year each individual, firm, organization, or governmental agency of any kind who makes payments to a nonresident contractor for performance of any contract, except contracts of sale, *shall withhold* from such payments the amount of gross income tax owed upon the receipt of those payments under this article. IC 6-2.1-6-1.

Withholding agent means an entity required to withhold gross income taxes under IC 6-2.1-6. The term includes a person or entity making payments to a nonresident contractor . . . the following contracts are examples of service work that would require withholding on payments to nonresident contractors subject to the gross income tax: (1) A construction contract of any kind . . . (4) a contract for the furnishing and installation of tangible personal property.

45 IAC 1.1-1-24. Taxpayer made payments to a number of nonresident contractors who supplied, furnished, installed, and tested machinery at taxpayer's manufacturing facility.

The Department determined that taxpayer failed to withhold gross income tax on its contracts with nonresident contractors. Taxpayer protests this determination and argues that it did not have a duty to withhold gross income tax on such payments. Taxpayer advances two arguments to support its position that it was not required to withhold gross income tax from its payments to nonresident contractors: (1) taxpayer contends that its contracts were "contracts of sale" and thus, exempt pursuant to IC 6-2.1-6-1 and (2) taxpayer argues its facts are analogous to Brown Boveri Corp. v. Indiana Department of State Revenue, 439 N.E.2d 561 (Ind. 1982), that held assembly included in a sale of property from a nonresident vendor was not subject to gross income tax.

First, taxpayer argues that it made payments to nonresident contractors on contracts of sale. Taxpayer argues that these payments should thus be excepted from gross income tax pursuant to IC 6-2.1-6-1. However, the nature of these contracts were such that the nonresident contractors did more than merely sell goods to taxpayer. For example, one contractor was also required to oversee delivery and start-up of the machinery provided to taxpayer. Another contractor was responsible for delivery, installation, and inspection. These contracts cannot be considered contracts of sale as described by IC 6-2.1-6-1. Thus, the Department finds that taxpayer's first argument is without merit.

Secondly, taxpayer argues that its facts are analogous to Brown Boveri. In that case, the Indiana Supreme Court held that a contract that included *assembly* of tangible personal property from a nonresident vendor was not subject to gross income tax. This argument fails for two reasons.

First, taxpayer lacks standing to make this argument. Brown Boveri involved a nonresident contractor's challenge to gross income tax assessed on its income received from Indiana contracts. In this case, taxpayer is attempting to make an argument that may be made by nonresident contractors. However, the duty to withhold does not turn on whether the transaction is subject to gross income tax. Rather, the statute sets for an affirmative duty of a withholding agent to withhold gross income tax on payments to nonresident contractors. A contract for the furnishing and installation of tangible personal property is an example of a contract upon which a withholding agent (in this case, taxpayer) is required to withhold gross income tax. 45 IAC 1.1-1-24.

Second, even if taxpayer did have standing to make this argument, the facts of this case are not analogous to those in Brown Boveri. In that case, the additional service involved was mere *assembly* of disassembled tangible personal property. In this case, the contracts involved the nonresident contractor's installation, start-up, testing, and inspection of the purchased equipment. Thus, taxpayer's arguments that it was not required to withhold gross income tax from payments made to nonresident contractors on contracts for furnishing and installing tangible personal

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property are without merit. The Department finds that taxpayer had a duty to withhold gross income tax and failed to do so. Therefore, the tax assessment remains valid.

FINDING

The taxpayer's protest is denied.